**Hillhaven Convalescent Center of Delray Beach *and* 1115 Nursing Home, Hospital & Service Employees Union-Florida, H.E.R.E, AFL–CIO, Petitioner.** Case 12–RC–7659

September 8, l995

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On November 5, l993, the Regional Director for Region 12 issued a Decision and Direction of Election in the above-entitled proceeding. He found that the Employer's technical employees, consisting of licensed practical nurses (LPNs) and a physical therapy assistant, may be excluded from the otherwise overall nonprofessional unit found appropriate at the Employer's nursing home.[1] The Regional Director further rejected the Petitioner's alternative contention that LPNs are statutory supervisors, finding that they are employees.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that the Regional Director did not properly apply the test set forth in *Park Manor Care Center*, 305 NLRB 872 (1991), and incorrectly concluded that technical employees working at the Employer's nursing home facility may be excluded from the otherwise all-nonprofessional employee unit sought by the Petitioner. On February 17, l994, the Board granted the Employer's request for review. The election was held as scheduled on December 2 and 3, l993, and the ballots were impounded pending the Board's Decision on Review. The Employer and the Petitioner filed briefs on review. Thereafter, the Petitioner filed a motion to remand the case to the Regional Director to apply ''the new legal standard'' set forth in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), to the issue of whether the Employer's LPNs are statutory supervisors. The Employer filed an opposition to the Petitioner's motion.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have considered the entire record in this case with respect to the issues on review and have decided to affirm the Regional Director's finding that a unit of all nonprofessional, nontechnical employees at the Employer's nursing home facility is an appropriate unit for bargaining. We amend, however, the Regional Director's Decision and Direction of Election to permit the physical therapy assistant to vote subject to challenge.

In *Park Manor*, supra, the Board ruled that the proper test for determining the appropriateness of bargaining units in nonacute care health care institutions is an ''empirical community of interest test.'' Under that test, the Board considers community-of-interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on Collective-Bargaining Units in the Health Care Industry, Second Notice of Proposed Rulemaking, 53 Fed.Reg. 33900 (Sept. 1, 1988), reprinted at 284 NLRB 1528, and Final Rule, 54 Fed.Reg. 16336 (Apr. 21, 1989), reprinted at 284 NLRB 1580. The Board further considers the evidence presented during rulemaking with respect to units in acute care hospitals, and prior cases involving either the type of unit sought or the type of health care facility in dispute. In remanding *Park Manor* to the Regional Director for application of this test, the Board observed that, if the employees excluded by the Regional Director could not themselves constitute a separate unit, they must perforce be included in the broader unit. 305 NLRB at 875 fn. 18. See also *Lifeline Mobile Medics*, 308 NLRB 1068 (1992).[3]

Thus, as explained in *Park Manor*, 305 NLRB at 876 (citing *Sheffield Corp.*, 134 NLRB 1101 (1961)), a finding of technical status does not automatically lead to exclusion from the broader unit, or to finding appropriate a separate technical unit. Rather, whether or not technical employees may constitute a separate appropriate unit depends on their relationship to other nonprofessional employees.

[1] The Petitioner sought a unit of certified nursing assistants, housekeeping employees, laundry employees, dietary aides, and kitchen employees. The Employer contended, contrary to the Petitioner, that the only appropriate unit must include all of its nonprofessional employees. The unit found appropriate by the Regional Director includes all full-time and regular part-time certified nursing assistants, nurses aides, housekeeping employees, laundry employees, janitors, dietary employees, physical therapy aides, occupational therapy aides, activity assistants, ward clerks, medical records clerks, central supply clerks, account payable clerks, weekday receptionists, and weekend receptionists employed by the Employer at its Delray Beach, Florida facility; excluding professional employees, technical employees, guards, and supervisors as defined in the Act.

[2] On August 3, 1995, the Employer filed a motion to dismiss the petition, asserting that the Petitioner is not a *bona fide* labor organization and it cannot be certified as a bargaining representative because it purportedly has not complied with minimal reporting requirements of Chapter 447 of the Florida statutes, the Florida Union Regulation Law. These facts as alleged by the Employer do not negate the Petitioner's status as a labor organization under Sec. 2(5) of the Act. It is sufficient that the Petitioner is an organization in which the employees participate and that exists for the purpose of dealing with the Employer concerning wages, hours, and other terms and conditions of employment. *Alto Plastics Mfg. Corp.*, 136 NLRB 850 (1962); *American Automobile Assn.*, 242 NLRB 722 fn. 3 (1979). Accordingly, the motion is denied. See *Eppinger & Russell Co.*, 56 NLRB 1259 (1944); *Hill v. State of Florida ex. rel Watson*, 325 U.S. 538 (1945).

[3] The instant case actually considers the issue from the opposite perspective: whether technical employees may be excluded from what is otherwise an all nonprofessional unit in a nursing home. The legal issue is the same.

As further explained in *Park Manor*, 305 NLRB at 875–876, the Board observed in the rulemaking that it is the particular characteristics of technical employees in acute care hospitals that necessarily set them apart from nontechnical employees or other nonprofessional employees, as they are increasingly becoming specialized and more highly educated, and, in general, the gap between technical employees and nontechnical employees is widening. The Board further observed that in acute care hospitals, the wage disparity between technical and nontechnical, nonprofessional employees is great; technical employees do not usually work in patient care areas; and there is little cross-training or interchange between the two groups.

The Board concluded in rulemaking that a rule concerning appropriate units in nursing homes was neither feasible nor necessary. See 53 Fed.Reg. at 33927–33928 (1988), reprinted at 284 NLRB at 1567. Similarly, the Board noted in *Park Manor*, 305 NLRB at 875, that it did not have a sufficient body of empirical data about nursing homes to make a uniform rule as to them at that time, and perhaps never would because they might not be sufficiently uniform to warrant finding the same units appropriate for all. Nevertheless, the Board in rulemaking did observe that in nursing homes, there is generally less diversity among technical employees and service employees, and the staff as a whole is more integrated than in acute care hospitals, because there is a greater overlap of functions and greater work contact in the nursing home environment. The Board noted that, generally, nurses provide a less intensive, lower level of care to patients in skilled and extended care facilities than that provided in acute care hospitals, and thus receive lower wages. Moreover, observed the Board, in nursing homes there is, for the most part, little difference between the duties of LPNs and those of nurses aides; both are primarily responsible for providing care to patients. See 53 Fed.Reg. 33927–33928, reprinted at 284 NLRB at 1567.

In the instant case, the record supports the Regional Director's conclusion that a separate technical unit consisting of 12 LPNs and perhaps 1 physical therapy assistant—the only technical employees employed by the Employer—would be an appropriate unit under *Park Manor*, notwithstanding that some community of interest factors, such as significant cross-training between LPNs and certified nursing assistants (CNAs),[4] common supervision (LPNs and CNAs), frequent contact with unit employees, and similar working conditions,[5] favor the inclusion of technical employees in the unit.[6] Also, as noted by the Regional Director, LPNs perform some overlapping functions with CNAs.[7] By virtue of their specialized skills and license,[8] however, LPNs are permitted to perform functions that CNAs are not. These functions include administering medication, treating decubitus, dealing with feeding tubes for residents, and charting residents' medications. In addition, LPNs have keys to the medical supply (including adrotics), give shots, and use the glaucometer to check blood sugar.

We note that each patient at the Employer's home has a comprehensive care plan that requires teamwork between LPNs, CNAs, and other employees. Thus, LPNs and CNAs are assigned to the same patients each day, and they work from the same flow charts that document team care given and needed by each resident on a daily basis. When LPNs and CNAs perform their separate functions with respect to patient care, however, the record evidence does not indicate that they are necessarily together in the same room, at the same time, assisting patients.[9] Furthermore, there is no showing that the job-related contact here between LPNs and CNAs is any greater than the contact between LPNs and CNAs in acute care hospitals, where separate technical units (including LPNs) are appropriate.

The wide wage gap between the Employer's LPNs and CNAs also supports a finding that a separate technical unit may be appropriate. In this regard, LPNs

[4] LPNs and CNAs attend the same orientation and in-service training sessions regarding AIDS, hepatitis B, resident waste, infection control, evacuation procedures, chair scale, resident transfer, and decubitus.

[5] LPNs and CNAs are hourly paid, have the same benefit package, share the same lunchrooms and bulletin board, and are subject to the same personnel policies as unit employees. LPNs and CNAs wear the same uniforms.

[6] The Employer suggests that the Regional Director erred in finding LPNs to be technical employees, arguing that they exercise limited independent judgment. We find no merit to this argument, and note that the Board has traditionally found LPNs with skills, functions, and educations similar to those of the Employer's LPNs to be technical employees. See *Pine Manor Nursing Home*, 238 NLRB 1654, 1656 (1978).

[7] LPNs, like the 43 CNAs included in the unit, are engaged in direct patient care. Employees in both classifications operate blood pressure kits, take temperatures, operate scales, use a gait transfer belt to transfer residents from wheelchairs, help heavy patients from bed with a hoyer lift, assist with hygiene and the bathroom, and help to dress patients. Both work out of the nursing station to do patient charting; take patients to the activities, therapy, and dining rooms; go to the kitchen to get food for patients; and monitor patients (e.g., how much they are eating).

[8] LPNs are required to have a high school diploma or GED, attend 1 year of accredited schooling, and be licensed by the State of Florida. By contrast, CNAs are not required to finish high school or have a GED, and their training includes 6 weeks to 6 months of training (depending on the program) and a test to become certified.

[9] The Board in rulemaking observed that participation in teams does not change the employee's basic role, and concluded that the use of the team concept in some hospitals does not detract from the separate appropriateness of RN units. The same reasoning applies here. See 53 Fed.Reg. 33907, 33913, reprinted at 284 NLRB at 1538, 1546.

earn $10 per hour, while CNAs earn $5.50 per hour. Moreover, the 12- or 13-member technical unit, although not large, is a sufficient size to warrant separation.[10]

Prerulemaking case precedent with respect to the appropriateness of separate units of technical employees at nursing homes was not consistent, and thus does not offer definitive guidance regarding whether technical employees may be excluded from the petitioned-for nonprofessional unit in the Employer's nursing home. See discussion in *Brattleboro Retreat*, 310 NLRB 615, 616 (1993), of the Board's previous applications of the community of interest and disparity of interest tests in nursing home settings; both standards were abandoned by the Board in the course of promulgating its rule respecting appropriate bargaining units in acute care hospitals. 53 Fed.Reg. 33905, reprinted at 284 NLRB 1535; *Park Manor*, 305 NLRB at 875.

We find this case to be distinguishable from *Upstate Home for Children*, 309 NLRB 986 (1992), relied on by the Employer. Unlike the instant case, that case involved, inter alia, the issue of whether a *portion* of the technical employees (LPNs) at the employer's facility could constitute a separate appropriate unit, not whether a separate unit of *all* technical employees would be appropriate in a nursing home. In *Upstate*, the Board affirmed the Regional Director's dismissal of petitions for separate units of LPNs (technical employees) and RNs (professional employees) employed in the employer's residential school and care facilities for the mentally retarded. Unlike here, nurses had significant contact and common supervision with other professional and technical employees not included in the petitioned-for units (they also had significant contact, common supervision, and functional integration with other nonprofessional employees); and nonnursing staff in both classes and residences (e.g., classroom aides, teaching assistants, child development aides) also administered certain treatments prescribed by doctors, and were certified to, and did, dispense medications.

Although this case has some similarities to *Brattleboro Retreat*, supra, we find it to be distinguishable. In that case, the Board found the petitioned-for unit of technical employees to be inappropriate at the employer's combination psychiatric hospital/nursing home.[11] There, similar to here, all nonprofessional employees shared common personnel policies, benefits, and overall working conditions; the employer's operations were functionally integrated; the technical employees had important and frequent work-related contact with nontechnical, nonprofessional employees; some technical employees shared common supervision with some nontechnical, nonprofessional employees; some employees in both groups performed common functions; and the technical employees were involved in direct patient care. In Brattleboro, however, unlike here, the wage differentials between technical employees and nontechnical employees were fairly small, and technical employees shared wage classifications with many nontechnical, nonprofessional employees. Also, many of the technical employees were required to have only a high school education and did not acquire their skills through technical schools or colleges, and many nontechnical employees were required to have high school educations. In addition, the incidence of transfers between technical and nontechnical classifications in *Brattleboro* suggested a lack of strong distinction between technical employees and other nonprofessionals; there is no evidence of any such transfers here.

In sum, we conclude that, applying the *Park Manor* test (including post-*Park Manor* case precedent) to the particular factual circumstances of this case, the Regional Director correctly found that the Employer's technical employees may be excluded from the bargaining unit.[12]

With respect to the Regional Director's finding that the physical therapy assistant is a technical employee, we find the record is too sparse as to his duties and responsibilities to make a judgment. Accordingly, we amend the Decision and Direction of Election to permit the physical therapy assistant to vote under challenge.

## ORDER

The Regional Director's Decision and Direction of Election is affirmed with respect to the exclusion of the LPNs. The Decision and Direction of Election is amended, however, to permit the physical therapy assistant to vote under challenge. This proceeding is remanded to the Regional Director for further appropriate action, including the opening and counting of the ballots cast in the election, consistent with this Decision on Review.

[10] In rulemaking, the Board found a unit of five or fewer employees to constitute an extraordinary circumstance warranting a case-by-case determination. 54 Fed.Reg. 16341–16342 (1989), reprinted at 284 NLRB at 1588. Such considerations are also applicable to nonacute care facilities.

[11] The petitioned-for unit consisted primarily of non-LPN technical employees, such as mental health workers, adolescent care workers, etc.

[12] Because LPNs are excluded because of their technical status, we find it unnecessary to rule on the Petitioner's motion to remand the case to the Regional Director to consider whether LPNs are statutory supervisors under *Health Care & Retirement.*